STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
January 12, 2012

In the Matter of K. J. SILVA, Minor.

No. 304711
Marquette Circuit Court
Family Division
LC No. 07-008574-NA

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Respondent father appeals by right the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(g). For the reasons stated in this opinion, we affirm.

The Department of Human Services (DHS) first opened a case regarding the minor child in February 2007, when the minor child was removed from his mother's home. That case was closed in January 2008, and the minor child was returned to his mother's custody; however, the minor child was removed again in October 2009. A petition to terminate both the mother's and respondent's parental rights to the minor child was filed on January 27, 2011.[1]

In regard to respondent, the petition alleged that during the previous court intervention in 2007 and 2008, respondent "had great difficulty following the treatment plan and court orders." It alleged that respondent was in and out of jail during the course of the case, and that when he eventually submitted to a substance abuse assessment,[2] he was diagnosed with alcohol dependence and polysubstance abuse. The petition alleged that respondent moved away from the area where the minor child lived and did not maintain regular contact with the minor child. The petition detailed respondent's involvement with the criminal justice system, failure to contact the caseworker, failure to appear at hearings, and failure to participate in court-ordered services. It

[1] The mother released her parental rights to the minor child on March 29, 2011, after permanency planning mediation. Respondent also participated in the permanency planning mediation, and initially agreed to release his parental rights; however, he changed his mind about releasing his rights.

[2] Respondent was ordered to obtain a substance abuse assessment multiple times before he actually complied.

also noted that respondent did not obtain employment or establish a suitable home for himself since the removal of the minor child. Further, it alleged respondent failed to provide financial support for the minor child.

The hearing regarding the termination of respondent's parental rights was held on May 2, 2011. Sandra Sheltrow, the DHS caseworker, and respondent testified. The testimony confirmed the allegations set forth in the petition. After hearing the testimony, the trial court took the matter under advisement, and entered a written opinion on May 18, 2011. The trial court found that over the four years that the minor child was "in and out of parental care and sometimes under court jurisdiction," respondent "consistently failed to make himself available to provide a stable home" for the minor child. The trial court noted that respondent has a history of criminal charges, has been "in and out of the area, in and out of jail," has not maintained contact with the caseworker, has not consistently participated in services, and only periodically called to say he wanted to be part of the minor child's life. The trial court concluded that the evidence presented at the termination hearing demonstrated that there was a reasonable expectation that respondent would not be able to meet the needs of the minor child within a reasonable time.

On appeal, respondent first argues that the trial court clearly erred in finding that there was clear and convincing evidence to support the statutory ground for termination.

In order to terminate parental rights, a trial court must find that at least one statutory ground for termination in MCL 712A.19b has been proven by clear and convincing evidence. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). We review the trial court's findings of fact for clear error. MCR 3.977(K); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* at 209-210. Deference is given to the trial court's special opportunity to judge the weight of evidence and the credibility of witnesses who appear before it. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

We conclude that the trial court did not clearly err. Respondent's parental rights were terminated pursuant to MCL 712A.19b(g), which provides: "The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." The evidence established that respondent's life was unstable. He made very poor choices throughout this case, including fleeing the state to avoid his criminal obligations in the area where the minor child resided. He was in and out of jail for various criminal activities. Although at the time of the termination hearing he had taken care of his criminal obligations, he had not consistently paid child support and had been unemployed without job prospects for a considerable amount of time. He was living on food stamps and help from various friends and organizations, and he did not have a suitable home for the child.[3] His intent was to have custody of his son, with whom he had a good relationship; however, he had

[3] Respondent testified that he planned to move the minor child from Marquette, Michigan to Grand Haven, Michigan so they could live with respondent's mother and step-father.

not demonstrated the ability to follow through on the provided services or to maintain any kind of stable and consistent life. Accordingly, we are not left with a definite and firm conviction that the trial court erred when it determined that there was clear and convincing evidence that respondent had not provided proper care or custody for his child in the past and, without regard to intent, would not be able to do so in the future.

Respondent next argues that the trial court erred when it determined that termination of respondent's parental rights was in the best interests of the child. We review the trial court's decision regarding the child's best interests for clear error. *In re Trejo,* 462 Mich 341, 356-367; 612 NW2d 407 (2000).

We conclude that the trial court did not clearly err in determining that termination was in the best interests of the child. Although the evidence showed that there was a strong bond between respondent and the child, the child had been living in limbo for a considerable time and respondent had been an intermittent and unstable presence in his son's life. The evidence demonstrated that respondent would not be able to care for the child within a reasonable time. The trial court noted that the minor child was living with a family that wanted to adopt him. Once a statutory ground for termination is clearly and convincingly established, a court may consider alternative homes and the possibility of adoption when weighing what arrangement would enhance a child's best interests. *In re BZ,* 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re Shawboose,* 175 Mich App 637, 640-641; 438 NW2d 272 (1989). Accordingly, we are not left with a definite and firm conviction that the trial court was mistaken.

Next, respondent argues that the trial court erred in terminating his parental rights because petitioner failed to make reasonable efforts toward reunification. We review a trial court's decision to terminate parental rights for clear error. *In re Trejo,* 462 Mich at 356-367.

The DHS is required to prepare a case service plan that includes "[e]fforts to be made by the agency to return the child to his or her home," and a "[s]chedule of services to be provided to the parent . . . to facilitate the child's return to his or her home" before the trial court enters an order of disposition in child protection proceedings. MCL 712.18f(2) and (3). "Reasonable efforts to reunite the child and family must be made in all cases except" those involving certain aggravating circumstances not present here. MCL 712A.19a(2); *In re Mason,* 486 Mich 142, 152; 782 NW2d 747 (2010).

In this case, the evidence does not support respondent's contention that petitioner did not make reasonable efforts toward reunification. Respondent was offered services; however, he failed to complete most of the programs that were provided, and was frequently living out of the area or without suitable housing. Further, respondent has not provided any legal authority to establish that failure by the petitioner to make reasonable efforts would establish a basis for relief. The absence of reasonable efforts for reunification on the part of the petitioner is generally relevant in assessing whether the statutory grounds for termination were established. See, e.g., *In re Newman,* 189 Mich App 61, 65-68; 472 NW2d 38 (1991).

Respondent next argues that the trial court failed to comply with MCL 712A.13a(11) to order parenting time. We review de novo the interpretation and application of statutes and court rules. *In re Mason,* 486 Mich at 152.

MCL 712A.13a(11) provides that the trial court "shall permit the juvenile's parent to have frequent parenting time with the juvenile" if a juvenile is removed from his or her home. Respondent's argument that the trial court failed to comply with MCL 712A.13a(11) is not supported by the record. Parenting time was provided for respondent on several occasions. On June 21, 2007, the trial court ordered supervised parenting time; however, that parenting time was suspended after respondent failed to comply with a substance abuse assessment, drug screenings, and other services. After that, respondent left the area in order to avoid his warrants and jail time and failed to maintain contact with the caseworker. Petitioner was unable to provide visitation until respondent returned to the area, took care of his criminal obligations, and maintained contact with the worker. Petitioner was not required to provide parenting time and services during the time respondent was living hundreds of miles away from the area where the minor child resided or in other states. When respondent did make himself available, he was about to be incarcerated and petitioner indicated it would be too disruptive and upsetting for the child to have a few visits and then not see respondent while he was in jail. Under MCL 712A.13a(11), the court was not required to provide parenting time if the visit might be harmful to the child. In an order entered October 11, 2010, respondent was again granted supervised parenting time. The fact that respondent did not take advantage of the parenting time that he was provided does not constitute failure to comply with MCL 712A.13a(11) on the part of petitioner. Accordingly, we find no error.

Lastly, respondent argues that the trial court failed to timely appoint an attorney to represent him. Because respondent did not raise this issue in the trial court, we review the alleged error for plain error affecting respondent's substantial rights. *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009).

A respondent in child protective proceedings has a due process right to counsel. *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich at 353 n 10. The right to counsel during a termination proceeding is also guaranteed by statute and court rule. MCL 712A.17c(5) provides that, if it appears to the court in a child protection proceeding that "the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent." Likewise, MCR 3.915(B)(1)(a)(i) provides that, at a respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney, and of the right to a court-appointed attorney if the respondent is financially unable to retain an attorney.

Respondent was required to take affirmative action in order to have an attorney appointed for him at the statutory review hearings. *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991). Respondent acknowledges that, on October 20, 2009, when he first appeared by telephone, he was told that if he wanted an attorney appointed for him, he needed to fill out the financial forms. He acknowledges that he did not fill out the forms until March 2010, and an attorney was promptly appointed for him after he completed the required paperwork. Thus, respondent admits that he failed to take "affirmative action" to have an attorney appointed. The court was not required to appoint an attorney for respondent when his whereabouts were unknown. Even if respondent had received permission to visit the child sooner or more often, more visits would not have changed the outcome of this case as no one questioned the bond between respondent and his son or that visitation always went well. Accordingly, respondent has failed to show plain error that affected his substantial rights.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello